STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2014
v	No. 311954 Kent Circuit Court
JAMES MARQUIS SPENCER, Defendant-Appellant.	LC No. 11-000241-FC

Before: HOEKSTRA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a bench trial, defendant James Marquis Spencer was convicted of one count of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(d), and sentenced to 108 to 300 months' imprisonment. Defendant now appeals as of right. For the reasons stated in this opinion, we affirm.

On appeal, defendant first argues that due process required the suppression of his statement to the police. We disagree.

Because defendant did not move to suppress his statement before the trial court or object to the testimony regarding the interrogation, we review his claim of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

This Court has repeatedly recognized that the due process clauses of the United States and Michigan Constitutions do not require audiovisual recording of custodial interrogations. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004), citing *California v Trombetta*, 467 US 479; 104 S Ct 2528, 2533; 81 L Ed 2d 413 (1984); *People v Fike*, 228 Mich App 178, 184; 577 NW2d 903 (1998). Defendant first urges us to reconsider our previous decisions and to instead follow the rationale of *Stephan v State*, 711 P2d 1156, 1158-1159 (Alaska, 1985), wherein the Alaskan Supreme Court concluded that due process requires recording of interrogations occurring in a place of detention. This decision, however, was based entirely on the court's interpretation of due process guarantees under Alaska's state constitution, *id.* at 1160, and is an anomaly among states that have considered the issue. See *Fike*, 228 Mich App at 185 ("[T]he majority of state courts that have considered this issue have specifically rejected the conclusion reached by the Alaska Supreme Court.") Indeed, recognizing due process does not require audiovisual recording of custodial interrogations, this Court in *Fike*, specifically declined to follow *Stephan*. *Id.* Ultimately, defendant's due process argument fails because *Fike* and

Geno are precedentially binding decisions of this Court, MCR 7.215(C)(2), (J)(1), under which defendant was not entitled to recording of his interrogation or suppression of his statement. In sum, we are not persuaded that our prior rulings relating to this issue need to be reconsidered.

Defendant further argues that this Court's decision in *Fike* should be overruled on the basis of the Michigan Legislature's enactment of 2012 PA 479. Accordingly, defendant argues that his statement should have been suppressed or, at a minimum, an instruction read regarding the jury's ability to consider the lack of a recording. We disagree.

With the enactment of 2012 PA 479, which became effective March 28, 2013, Michigan's Legislature made the recording of custodial interrogations a statutory requirement. Specifically, Michigan's Legislature directed law enforcement officers to record interrogations in specific circumstances, as follows:

> A law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony shall make a time-stamped, audiovisual recording of the entire interrogation. A major felony recording shall include the law enforcement official's notification to the individual of the individual's Miranda rights. [MCL 763.8(2).]

The statute expressly characterizes this recording requirement as "a directive to departments and law enforcement officials and not a right conferred on an individual who is interrogated." MCL 763.10. When law enforcement officials fail to abide by MCL 763.8, exclusion of the unrecorded statements at trial is not required. MCL 763.9. Rather, the appropriate remedial measures are statutorily provided as follows:

> Any failure to record a statement as required under [MCL 763.8] or to preserve a recorded statement does not prevent any law enforcement official present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement if the court determines that the statement is otherwise admissible. However, unless the individual objected to having the interrogation recorded and that objection was properly documented under section 8(3), the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement. [MCL 763.9.]

Contrary to defendant's arguments, the provisions on which he relies do not require us to overrule *Fike*. The decision in *Fike* was constitutional in nature, recognizing that there is no due process right to have an interrogation recorded. *Fike*, 228 Mich App at 185. In contrast, the provisions on which defendant now relies are statutory and, consequently, any requirement that police record an interrogation, and the remedy for failure to do so, is a statutory matter, not a constitutional issue. Cf. *People v Piffer*, 40 Mich App 419, 421; 198 NW2d 907 (1972) (recognizing right to a nonjury trial was a statutory matter under MCL 763.3, not a constitutional right). Thus, our decision in *Fike* continues to control the due process question.

Considering defendant's reliance on the statutory provisions, we conclude that he is not entitled to the relief he seeks. The statutory mandates on which defendant relies were enacted in 2012, after defendant's interrogation and trial, and, because the provisions were plainly intended to apply prospectively, they have no application to defendant's case. Generally, statutes are presumed to operate prospectively, *People v Conyer*, 281 Mich App 526, 529; 762 NW2d 198 (2008), and in this case, the terms of 2012 PA 479 are plainly prospective, as evidenced by the prospective time frames for law enforcement compliance as provided in MCL 763.11(1), (3) and (4). Moreover, although the law was approved December 27, 2012, it did not take effect until March 28, 2013, further demonstrating the law's prospective effect from that date. See *Conyer*, 281 Mich App at 531. Quite simply, at the time defendant was questioned there was no statutory requirement that the detective record the interview; consequently, there was no statutory violation and defendant was not entitled to a jury instruction.

Moreover, the Legislature made no provision for exclusion of a statement upon violation of the recording requirement, stating expressly that failure to record a statement "does not prevent any law enforcement official present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement . . . ." MCL 763.9. Given the plain remedy detailed in the statute, exclusion of evidence would be entirely unwarranted under these provisions. See *People v Anstey*, 476 Mich 436, 448-449; 719 NW2d 579 (2006) ("[S]uppression of the evidence is not an appropriate remedy for a statutory violation where there is no indication in the statute that the Legislature intended such a remedy and no constitutional rights were violated."). Further, while MCL 763.9 requires a jury instruction, defendant's claim to such an instruction in this case is unavailing given there was no jury and, in a bench trial, "the trial court is presumed to know the applicable law." See *People v Lanzo Constr Co*, 272 Mich App 470, 484; 726 NW2d 746 (2006).

Next, defendant contends that the trial court's amendment of the information after trial to include MCL 750.520b(1)(f) as an alternative theory of guilt violated his due process right to be informed of the nature and cause of the accusation against him.

Because defendant did not preserve his challenge to the trial court's amendment of the information, his claim is reviewed for plain error affecting his substantial rights. *People v Reid (On Remand)*, 292 Mich App 508, 514; 810 NW2d 391 (2011).

It is well-settled that at any time before, during or even *after* trial, a trial court may permit amendment of the information to "correct a variance between the information and the proofs." *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008); MCL 767.76; MCR 6.112(H). However, amendment is not permitted where it would "unduly prejudice the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *Id.* (citation omitted).

In this case, the information filed before trial charged defendant with first-degree CSC under MCL 750.520b(1)(d)(*i*) and/or MCL 750.520b(1)(d)(*ii*). However, when documenting its findings of fact and conclusions of law, the trial court found proof beyond a reasonable doubt that defendant was guilty of one count of first-degree CSC under either MCL 750.520b(1)(d)(*ii*), which was charged, or MCL 750.520b(1)(f), which was not included in the information.

Despite the late nature of the amendment, we are not persuaded that defendant is entitled to relief in this case. Defendant was charged and convicted of first-degree CSC; thus, the amendment did not involve the addition of a new crime and defendant was generally apprised of the nature of the charge against him. See *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). More specifically, comparing the elements of MCL 750.520b(1)(d)(*ii*) and MCL 750.520b(1)(f), it becomes apparent that defendant had specific notice that he was being charged with "sexual penetration of another person" involving the use of "force or coercion." The only element of MCL 750.520b(1)(f) not specifically alleged in the information was "personal injury" to the victim.

Although the element of "personal injury" was not specifically accounted for in the information, on the facts of this case, we find a conviction premised on the victim's injuries was not unduly prejudicial. The injuries in this case, on which the trial court relied in finding "personal injury," involved petechiae on the anterior portion of victim's cervix as testified to by a nurse sexual assault examiner. Defendant did not contest the introduction of the evidence and the evidence did not appear to be a surprise at trial. On the contrary, the question of injury to the victim's cervix was relevant to the questions of sexual penetration and force, see MCL 750.520b(1)(d)(ii), and to defendant's proffered consent defense. Consequently, even though "personal injury" was not an element of a charge included in the information, it was a factual matter of relative importance at trial, on which evidence would have been introduced under the original charges, and, thus a matter defendant would have expected to confront at trial. Indeed, consistent with defendant's theory that the victim consented to the sexual encounter, defense counsel responded to the evidence of the victim's physical injury by eliciting testimony on cross-examination of the prosecution's expert that the injuries described could also be consistent with consensual sex. Given that defendant acknowledged having sex with the victim, claiming merely that it was consensual, and adduced testimony to indicate the victim's injuries were consistent with this theory, there is no reason to suppose defendant would have altered his defense. Indeed, even on appeal to this Court, where defendant bears the burden of establishing prejudice under the plain error standard, *People v Shafier*, 483 Mich 205, 220; 768 NW2d 305 (2009), defendant presents no specific explanation of how his defense might have differed or what specific evidence he might have produced. In the absence of some indication that defendant would have altered his defense if originally charged under MCL 750.520b(1)(f), the amendment at issue in this case did not unfairly prejudice defendant and he is not entitled to relief. See, e.g., *People v Fortson*, 202 Mich App 13, 16-17; 507 NW2d 763 (1993); *Stricklin*, 162 Mich App at 633-634; see also *People v Hunt*, 442 Mich 359, 365; 501 NW2d 151 (1993) (finding amendment was not prejudicial where "the defendant has not suggested anything that his attorney would have done differently").

Moreover, even if we were inclined to view the amendment as unduly prejudicial, we would still affirm defendant's first-degree CSC conviction. Defendant has one conviction, premised on alternative theories of guilt under MCL 750.520b(1)(d)(*ii*) and (1)(f). The trial court's findings of facts clearly articulated a finding of guilt beyond a reasonable doubt under MCL 750.520b(1)(d)(*ii*), which was included in the original information. Accordingly, even assuming some error in the amendment to include MCL 750.520b(1)(f), reversal is not required.

Next, defendant contends that imposition of a $130 crime victims right assessment under MCL 780.905(1)(a) constituted an ex post facto punishment because the $130 amount was set in

2010, after defendant's commission of the present offense in 2006. See 2010 PA 281 (effective December 16, 2010). This Court has previously rejected this argument, determining the assessment does not constitute punishment and thus does not run afoul of ex post facto principles when it is applied to offenses committed before 2010. See *People v Earl*, 297 Mich App 104, 114; 822 NW2d 271 (2012); *People v Jones*, 300 Mich App 652, 656; 834 NW2d 919 (2013). Although the Michigan Supreme Court has granted leave to appeal in *Earl*, this fact alone does not lessen the precedential effect of this Court's published decisions. MCR 7.215(C)(2). Consequently, until such time as the Michigan Supreme Court might decide otherwise, *Earl* controls and defendant is not entitled to relief.

In a Standard 4 brief, defendant raises numerous additional arguments, the majority of which are unpreserved and all of which are without merit. First, defendant alleges discovery violations related to DNA evidence, including constitutional violations under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). These claims are without merit. There is no general constitutional right to discovery in a criminal case. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). Rather, discovery in a criminal case is generally controlled by MCR 6.201. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). In this case, defendant made a discovery request before trial and the trial court entered a discovery order. Beyond an allegation that the prosecution withheld "DNA evidence" defendant has not explained what requested items were not disclosed pursuant to MCR 6.201 and he did not complain of a discovery violation in the trial court. On the contrary, defense counsel expressed satisfaction with the prosecution's discovery efforts before trial and, at a status conference, acknowledged receipt of DNA results. Indeed, the trial court provided defendant with funds to have the prosecution's DNA evidence independently reviewed and to have independent testing done on samples taken from the victim's jeans. Having failed to identify anything in the lower court record to suggest that the prosecution failed to provide the "DNA evidence" in question, defendant has not established a discovery violation and he is not entitled to relief. *Elston*, 462 Mich at 762.

For similar reasons, defendant's claimed *Brady* violation is without merit. Although, as noted, there is no general constitutional right to discovery in a criminal case, *id.* at 765, "[d]ue process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure," *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534, citing *Brady*, 373 US at 87. In order to establish a *Brady* violation, a defendant must demonstrate that (1) the state possessed favorable evidence, (2) the evidence was suppressed by the state, and (3) "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Youngblood v West Virginia*, 547 US 867, 870; 126 S Ct 2188; 165 L Ed 2d 269 (2006).

In this case, defendant has failed to satisfy any of the criteria for establishing a *Brady* violation. He has not shown that the state possessed favorable evidence, that it suppressed favorable evidence, or that he himself did not possess the evidence. On the contrary, on the record presented, it appears all documents relating to the DNA results were made available to defendant and he was afforded his own opportunity for review of those materials by an expert and, in the case of the victim's jeans, independent testing. Defense counsel expressed satisfaction with the prosecution's discovery efforts and in fact acknowledged that there was no indication that another source of DNA was recovered in the samples, also indicating before trial

that "[w]e have verified, by independent expert on the DNA, that the procedures were followed and so forth . . . ." Defendant may be unhappy with the DNA results, but he points to nothing in the record to suggest information was withheld, let alone information that would have been favorable to defendant. Further, given defendant's claim at trial that he had consensual sex with the victim during which the condom broke, the presence of defendant's seminal fluid was consistent with his consent defense and we fail to see what DNA evidence the prosecution could have withheld that would have created a reasonable probability of a different outcome. On the whole, defendant has not established a *Brady* violation and he is not entitled to relief. See *Youngblood*, 547 US at 870; *People v Cox*, 268 Mich App 440, 448-450; 709 NW2d 152 (2005).

As a related matter, defendant accuses the prosecution of failing to fully investigate the DNA evidence, speculating without any kind of specificity that the prosecution left "stuff" untested and that there could have been another person's DNA involved. Defendant's argument is belied as a factual matter by the testimony of several experts detailing the serological and DNA analysis conducted on the evidence in this case. The tests were conclusive; defendant was a match to the seminal fluid, and there was no indication that the prosecution ignored another person's DNA. However, even if there was additional "stuff" the prosecution left untested, "[a]bsent a showing of suppression of evidence, intentional misconduct, or bad faith," the prosecutor and the police are not required to test evidence, exhaust all scientific means at their disposal, or search for exculpatory evidence to exonerate defendant. *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). As discussed, defendant has not shown that the prosecution suppressed evidence, nor are there any indications of intentional misconduct or bad faith. Consequently, there is simply no authority that would have required the prosecution to conduct additional testing and defendant is not entitled to relief. *Id.*

Also relating to the DNA evidence in this case, defendant argues the prosecution failed to present DNA evidence at trial and at the preliminary examination. These arguments plainly lack merit as evidenced by the detailed expert testimony presented at trial. Similarly, at the preliminary examination, although an expert did not testify, a laboratory report detailing the DNA findings was admitted into evidence, documenting the likelihood of finding another match in the African-American population at one in 194.4 quintillion. Pursuant to MCL 600.2167, it was perfectly acceptable to offer a report in lieu of an expert's appearance and testimony, and ultimately, even if there were some error in the bindover proceedings, "the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless." *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

In an argument labeled as "perjured testimony," defendant next contends it was error to allow the use of a police report prepared by a former detective that included statements made by the victim. Given that the detective did not testify at trial, defendant's claim does not involve perjured testimony, but an allegation that introduction of the report was improper. However, not only did defendant fail to object to the report at trial, he was the proponent of the report's admission, using the report to impeach the victim's testimony by highlighting differences between her statements to the detective and her trial testimony. Given that defendant introduced the statements from the detective's report and relied on those statements to bolster his theory that the victim fabricated her claim of sexual assault, defendant cannot now claim admission of the report was error. See *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001) ("A

defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial and denied him a fair trial.").

Next, defendant raises unpreserved claims of prosecutorial misconduct, which we review for plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). In this case, defendant alleges that the prosecutor sponsored perjured testimony by allowing the victim to testify. It is well-established that a conviction obtained through the "knowing use of perjured testimony" offends due process guarantees and it must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Consequently, prosecutors may not knowingly use false testimony to obtain a conviction, and they are under a constitutional obligation to report perjury. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). In this case, however, there is no evidence of perjury. While it is true the victim's version of events differed from defendant's testimony, given that the trial court found defendant's testimony "incredible," "thoroughly unbelievable," and "at odds with all of the other evidence in the case," the differences between their testimonies hardly establishes that the victim committed perjury. Certainly, the prosecution was not required to disbelieve its own witness merely because there was contradictory testimony from defendant. See *id.* at 278. Moreover, although there were inconsistencies between the victim's statements to police and her trial testimony, the presence of prior inconsistent statements does not establish that the prosecution knowingly presented perjured testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Rather, any inconsistencies were the appropriate subject of impeachment during cross-examination, MRE 613; *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002), and the victim's credibility, and that of defendant, was a question for the trier of fact, *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). Given there is no evidence that the victim's testimony was false or that the prosecutor knew it to be false, defendant's claim of prosecutorial misconduct is without merit. *Parker*, 230 Mich App at 690. Regarding defendant's related claim that the prosecution vouched for the victim, defendant fails to provide citation to the record to support his claim and, thus, his argument is abandoned. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). In any event, our review of the record shows that there was no impropriety in the prosecution's comments regarding the victim's credibility. That is, the prosecutor did not vouch for the victim's credibility by claiming special knowledge, but instead permissibly argued based on the facts that the victim should be believed. See *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005).

Next, defendant argues the evidence was insufficient to support his conviction under either MCL 750.520b(1)(d)(*ii*) or MCL 750.520b(1)(f). We disagree. On an appeal from a bench trial, this Court reviews challenges to the sufficiency of the evidence de novo. *Lanzo Constr Co*, 272 Mich App at 473. "[T]his Court must review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). In addition, in a bench trial, the trial court's findings of fact are reviewed for clear error. *Lanzo Constr Co*, 272 Mich App at 473.

Under MCL 750.520b(1)(d)(*ii*), the prosecutor was required to show that: (1) defendant engaged in "sexual penetration with another person," (2) while he was "aided or abetted by 1 or more persons," and (3) that he used force or coercion to accomplish the sexual penetration.

MCL 750.520b(1)(d)(*ii*). Related to the elements of sexual penetration and use of force, the victim in this case testified that she was walking alone when two men followed her. One of them grabbed her arm, twisting it behind her back, and then the skinnier of the men pushed her to the ground. Her pants were ripped open and pulled down, and her legs were forced apart. The skinny man then sexually penetrated her vagina with his penis, ejaculating inside her. The victim plainly described sexual penetration accomplished by force, and the DNA evidence—matching defendant's DNA to seminal fluid found in the victim's vagina—established defendant's identity as the perpetrator. See MCL 750.520a(r); MCL 750.520b(1)(f). "The phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). In this case, the victim was 100 percent certain that, while the sexual assault occurred, a second man stood by, "egging on" her assailant and encouraging him to "hit that." His words plainly encouraged the commission of the crime establishing that defendant used force to sexually penetrate the victim while aided or abetted by another person. MCL 750.520b(1)(d)(*ii*).

Under the prosecution's alternative theory, the prosecution was required to show that defendant (1) engaged in "sexual penetration with another person," (2) caused "personal injury" to the victim, and (3) used "force or coercion" to accomplish the sexual penetration. MCL 750.520b(1)(f). As discussed, the elements of sexual penetration and use of force were established. "Personal injury" includes "bodily injury," MCL 750.520a(n), and, in this case, the medical exam conducted shortly after the assault revealed petechiae on the anterior portion of the victim's cervix, which the nurse examiner explained constituted injury to the skin. Although the injuries were not described as being particularly serious, they provided a sufficient basis on which to conclude that the victim suffered personal injury as a result of the assault. See *People v Mackle*, 241 Mich App 583, 596; 617 NW2d 339 (2000). Overall, under either theory, the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

Contrary to additional specific arguments raised by defendant on appeal in relation to the sufficiency of the evidence, it was not necessary for defendant's accomplice to testify at trial; the victim plainly described aiding and abetting and corroboration of this testimony was not required. See MCL 750.520h. Insofar as defendant implies he cannot be found guilty under MCL 750.520b(1)(d)(*ii*) because his accomplice's identity is unknown, he cites no authority for this proposition and MCL 750.520b(1)(d)(*ii*) requires an aider and abettor; it does not require proof of the aider and abettor's identity. Similarly, the rules of evidence do not require any specific format for the presentation of evidence, MRE 611(a); *People v Wilson*, 119 Mich App 606, 616; 326 NW2d 576 (1982), and defendant has not explained what specific "paperwork" he believes was required to support findings of force and injury. Regarding defendant's claim that the victim's injuries were consistent with consensual sex, be that as it may, the prosecution presented sufficient evidence, detailed above, on which to conclude that defendant caused the injuries to the victim; it was "not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). To the extent defendant challenges the victim's credibility as a witness, her credibility was ultimately a question for the trial court which we will not disturb on appeal. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Lastly, in an argument entitled "fruit of the poisonous tree," defendant argues, without adequate explanation or relevant legal citation, that "[b]ecause the prosecutor was supposed to use the report from 2006 from that old detective, she was not supposed to use the 2010 report . . . ." Having failed to satisfactorily brief this argument, defendant abandoned this claim and we decline to consider it. *Kevorkian*, 248 Mich App at 389.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Amy Ronayne Krause